IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL CONFIRMATION CASE No. 3 of 2004
With
CRIMINAL CONFIRMATION CASE No. 4 of 2004
With
CRIMINAL APPEAL No. 567 of 2004
With
CRIMINAL APPEAL No. 643 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA

HONOURABLE MR.JUSTICE MD SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT - Appellant(s)
Versus
JAMAN HAJI MAMAD JAT & 3 - Respondent(s)

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Appearance :

Confirmation Cases Nos.3 and 4 of 2004

MR RC KODEKAR, APP for Appellant-State
MR HASHIM QURESHI for for Respondent(s) : 1-4

Criminal Appeals Nos.567 of 2004 and 643 of 2004

MR HASHIM QURESHI for Appellants(s) : 1 - 4.
MR RC KODEKAR, APP for Respondent-State
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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA

and

HONOURABLE MR.JUSTICE MD SHAH

Date : 28/12/2006

COMMON C.A.V. JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.P.DHOLAKIA)

1.The appellants, original accused No.1-Jaman Haji Mahmad Jat, original accused No.3-Sachu Haji Ibrahim Jat, original accused No.4-Osman Ali Mahmad Jat and original accused No.5-Navaj Ali Jat of Sessions Case No.85 of 1999(original accused Nos.1 to 4 respectively of Sessions Case No.1 of 2002), were tried along with other accused by the learned Addl. Sessions Judge, Fast Track Court, Bhuj-Kutch, for the alleged commission of offences punishable under Sections 120(B), 121, 121(A), 122, 123 and 124(A), 489-A and 34 of the Indian Penal Code, Sections 25(d), 25(1)(AA), 25(1)(B)(C)(F) of Arms Act, Sections

4(b), 5 and 6 of the Explosive Substances Act, 1908, Section 3 of Criminal Law Amendment Act, Sections 3 and 6 of Indian Passport Rules (Entry Into India), Section 13(2) of Foreigners Act amended Section 14 and Section 6(1-A) of Indian Wireless and Telegraphic Act.

2. The accused Nos.1, 3, 4 and 5 were held guilty by the learned Addl. Sessions Judge and Fast Track Court, Bhuj-Kutch, vide judgment and order dated 25-3-2004 for the offence under Sections 120(B), 121, 121(A), 122, 123 and 124(A) and 34 of the Indian Penal Code, Sections 25(d), 25(1)(AA), 25(1)(B)(C)(F) of Arms Act, Sections 4(b), 5 and 6 of Explosive Substances Act, 1908, Section 3 of Criminal Law Amendment Act, Sections 3 and 6 of Indian Passport Rules (Entry Into India), Section 13(2) of Foreigners Act amended Section 14 and Section 6(1-A) of Indian Wireless and Telegraphic Act. However, they were acquitted for the offence under

Section 489(A) read with Section 34 of the Indian Penal Code.

3. They were sentenced to death and to pay fine of Rs.500/- each, in default to suffer for six months RI for the offence under Sec.121 of IPC. They were also sentenced to suffer for life and fine of Rs.500/-, in default, to suffer RI for six months for the offence under Secs. 120(B) read with Sec.121(A), 122, 124(A) and 34 of the Indian Penal Code; 10 years RI and pay fine of Rs.500/-, in default, to suffer for six months RI for the offence under Sec.123 of the Indian Penal Code; 20 years RI and to pay fine of Rs.1,000/-, in default, to suffer 2 years RI, for the offence under Sections 4(b), 5 and 6 of the Explosive Substances Act, 1908; 5 years RI and to pay fine of Rs.500/-, in default to suffer RI for one month for the offence under Sections 25(D), 25(1)(AA), 25(1)(B)(C)(F) of Indian Arms Act; 2 months and to pay fine of Rs.100/-, in default to

suffer RI for one month for the offence under Sections 3 and 6 of Indian Passport Rules (Entry Into India) and six months RI and to pay fine of Rs.500/-, in default, to suffer RI for six months for the offence under Section 13(2) of Foreigners Act amended Section 14. No separate sentences were awarded for the offence under Section 3 of Criminal Law Amendment Act as well as for the offence under Section 6(1-A) of Indian Wireless and Telegraphic Act. All the sentences were ordered to run concurrently.

4. Being aggrieved by the aforesaid judgment and order of conviction, original accused Nos.1,3, 4 and 5 have filed Criminal Appeals Nos.567 of 2004 and 643 of 2004.

5. The Registry on receiving the record and proceedings of judgment and order of conviction dated 25-3-2004 in Sessions Case No.85 of 1999 from learned Addl. Sessions Judge (Fast Track Court), Bhuj-Kutch, for

confirmation of death of original accused No.1-Jaman Haji Mahmad Jat, original accused No.3-Sachu Haji Ibrahim Jat, original accused No.4-Osman Ali Mahmad Jat and original accused No.5-Navaj Ali Jat as required by Sec.366(1) of the Code of Criminal Procedure, 1973 (hereinafter referred to as “the Code" for short) has numbered them as Confirmation Cases Nos.3 of 2004 and 4 of 2004.

6. As Confirmation Cases Nos.3 of 2004 and 4 of 2004 as well as Criminal Appeals Nos.567 of 2004 and 643 of 2004 arose from the same judgment and order, these matters which were listed before other coordinate Benches were recently transferred in our Court as per the present roster. We have heard them together and are disposing of the same by this common judgment.

7. Short facts of the prosecution case are as under:

7.1 The Border Security Force ('BSF' for

short) was keeping more vigil and watch in the months of May and June, 1999 in the open border area of Kutch District, Gujarat State, connecting Pakistan border particularly in view of ongoing Kargil War. On 1-6-1999, BSF Khura Checking Party spotted foot prints of 6 persons near Sayara Village 1200 meters away from Guneri Tower outpost. Foot prints showed that intruders were coming from Pakistan border side towards Indian territory and, therefore, BSF Party reported about the illegal infiltration on 1-6-1999 through its Officers to Dayapar Police Station and in turn, PSI, Dayapar Police Station, registered Janvajog Entry No.12 of 1999 at 2310 hours on 1-6-1999 and in pursuance of that Janvajog Entry, police personnel along with panchas went to the place of foot prints and prepared panchnama to that effect. For the purpose of preserving the said foot prints, iron bowls were arranged and same were put up on the above referred foot prints and thereafter, in presence of panchas, moulded foot prints were

taken and ultimately, plastic mouldings of the said foot prints were prepared and same were taken as muddamal after preparing panchnama to that effect.

7.2 Considering the gravity and seriousness of offence, BSF Khura Checking Party started search on the basis of foot prints spotted and they formed two teams. As per the foot prints, they proceeded upto 30 kms. i.e. till Haraminale, abating Indian boarder side and about 3 kms. away from Haraminale they spotted one boatman with boat in Haraminale through telescope. They went near him and he was apprehended and on being asked, he informed his name as Jaman Mahommad Muslim, a Pakistani citizen. He was found with Pakistani currency note of Rs.277/-Pakistani ISI identity card in the name of Sultanshah Kayamshah, one visiting card of Murad Ali, ASI, Pakistan, etc. They prepared report to that effect. First they took him to Guneri Outpost and thereafter to Mudan and report to that effect was sent to their higher Officer as well as to the police

and the above person along with seized muddamal and its memo was handed over to Dayapar Police Station.

7.3 Simultaneously in pursuance of Janvajog Entry No.12 of 1999 of Dayapar Police Station, Kutch Police started operation for nabbing infiltrators. Meanwhile, Dy.S.P., Mr.P.L.Mal, Nakhatrana, Kutch Dist., received a secrete information on 4-6-1999 at about 2300 hours from his personal informant to the effect that Pakistani intruders are hidden in the culvert situated at the bottom of Gandaro/Sura hill and one Abdulla Adam Shaikh, resident of Village Nani Virani, was providing food to them. He was also trying to contact local persons for disbursing the articles brought by the intruders from Pakistan. The said secret information was reduced in writing by Mr.Mal in his own handwriting. He then went to Dayapar Police Station and informed about the same to his superior Officers. He also informed PSI, Dayapar, to call panchas and on

arrival of panchas, primary panchnama was prepared in the Police Station and a raiding party was arranged in which he, his superior Officer and other police personnel were members. Thereafter, Mr.Mal along with other police personnel went towards the direction of information at about 00.30 hours and reached near Gandaro/Sura hill via Dayapar ST Stand, Nani Virani, etc. They left their vehicle there and proceeded towards Gandaro/Sura hill walking a distance of 4 kms. When they reached near the place of information, they covered the area and thereafter apprehended the persons found there. On inquiry, one person stated his name as Sultanshah @ Kayamshah @ Sajimiya Saheb Saiyed, a resident of New Karachi, Pakistan. He had worn Salwar Kamis and white canvas shoes and same were seized after completing necessary formalities. On his personal search, one revolver of Rosi Company loaded with 2 cartridges was seized after completing all legal formalities. From his pocket, a chit of paper was found wherein

Bhojani Travel Private Limited, Karachi, Pakistan, was written with telephone numbers in English, Gujarati and Urdu languages and same was also seized. Thereafter, another person was found and on inquiry, he stated his name as Sachu Haji Ibrahim Jat, a resident of K.T. Bandar, Pakistan. He had also worn kurta and pyjama and white canvas shoes and same were seized after necessary formalities. On his personal search, one revolver of Rosi Company with magazine loaded with 6 cartridges was seized after completing all legal formalities. Third person on inquiry stated his name as Osman Alimamad Jat, resident of K.T. Bandar, Pakistan. He had worn kurta and pyjama and white canvas shoes and same were also seized after necessary formalities. On his personal search, one revolver of Rosi Company with magazine loaded with 6 cartridges were found and on the butt of revolver which was made in China, star was shown. Same were also seized after completing all legal formalities. Next person on inquiry stated his

name as Navaz Ali Jat, a resident of K.T. Bandar, Pakistan. He had worn white canvas shoes and same was seized after completing necessary formalities. On his personal search, nothing was found. Next person on inquiry stated his name as Farid Munavar Bhatti, resident of Karachi, Pakistan. He had worn plastic sandal. Nothing was found from this person also.

7.4 Upon completion of all formalities of preparing panchnamas and seizing muddamals, the raiding party including panchas and accused along with the above referred muddamals reached Dayapar Police Station on 5-6-1996 at 5.00 a.m. They started interrogation of Sultanshah @ Kayamshah @ Sajimiya Saheb Saiyed. As he showed willingness to show arms and ammunition and other highly explosive items which they brought and hid with them, he again informed PSI, Dayapar Police Station to call panchas. PSI, Dayapar Police Station, called 2 panchas and primary panchnama to that

effect was prepared there itself. Thereafter, he along with other police personnel, panchas and also with Sultanshah @ Kayamshah @ Sajimiya started in a Government vehicle in which Sultanshah @ Kayamshah sat in front seat and jeep was driven by the driver as per the instruction given by Sultanshah @ Kayamshah and they reached Nani Virani, Dhaduli and Siyut hill. At that time, Sultanshah @ Kayamshah instructed driver of the jeep to stop the vehicle. Sultanshah @ Kayamshah then led the panchas and police personnel towards west direction upto 2 km. and he took all panchas and police personnel very near to a place which burst out due to digging limestones where water logging was there. Thereafter, he led all the personnel towards the area wherein he stopped himself very near a cactus plant. He removed the sand and took out the packets covered in plastic. It was 30 in number out of which, one packet was opened in presence of all concerned persons including Sultanshah @ Kayamshah and they found two

pistols and two spare magazines. Simultaneously, in another packet, they found 2 revolvers. When they opened one packet in rectangular shape, they found wireless set and other material which were packed in thermocol and it was five in number in which they found pencil timer. Thereafter, in one packet they found white colour as well as black colour wires and 15 detonators. One end of detonator was connected with wire of different colour. In one plastic bag, they found one brown tin and on opening the same, they found 5 switches red in colour and one remote control and in another 2 tins, they found small detonators. In one heavy plastic bag, they found cartridges of different sizes which can be used in revolver and pistol. As it was impossible to prepare detailed panchnama on the spot, with the consent of the panchas and other persons, those muddamals and other muddamals packets 12 in number were seized. Prior to that, one was opened in presence of panchas wherein they found 4 packets and on

opening one of them, they found black substance and primary opinion was of RDX and all were packed in 2 plastic bags and on them, they applied seal of LCB, Bhuj, and also put the slip signed by panchas and Police personnel. Thereafter, they came back to Dayapar Police Station and for the purpose of preparing detailed panchnama, they again arranged for panchas and started to prepare detailed panchnama. In one of the 2 bags, they found 30 packets and when one packet marked with A and B was opened, they found 54 pistols and 6 revolvers. Out of those 54 pistols, 20 pistols were made in China by Moring Gokal 30 Company which was mentioned in English language and 17 pistols were made in China by Moring Kokal 30, the number mentioned in those pistols was in English and 2 revolvers of Rosi Company was made in Brazil. Each of the pistols was having one spare magazine and it has been again seized as muddamal after applying the seal of LCB, Bhuj and panch slip. On opening 12 packets in square shape, every

packet was found to have 4 sub-packets and all those packets contained black substance and primarily which was opined to be RDX. On opening afore referred 12 big packets, total 48 packets were found weighing 2 kg. In short, as per the panchnama, 24 kg. RDX were found from their possession along with above referred arms, ammunition and explosive substances. Same were seized after completing all legal formalities. Thereafter, on opening the rectangular bags, they found wireless set made in Japan. On opening 5 thermocol packets, each packet was containing 2 timer pencils, 15 detonators with wire and 15 detonators without wire. In another packet, they found white cordex wire of 30.5 feet and another black colour wire of 45 feet which was a safety fuse. They also found one tin containing remote control stitched in red colour plastic bags and on opening the plastic bags, different cartridges numbering 572 were found and detailed panchnamas to that effect was prepared.

7.5 As Kargil War was going on in full swing and during that period since huge quantity of arms, ammunitions and explosive substances were recovered at the instance of Pakistani nationals who entered into Indian Territory, further investigations were required more particularly by various agencies of Central as well as State for reaching the roots of the conspiracy and, therefore, Civil Authority and District Superintendent of Police, Bhuj-Kutch, passed a restriction order on 6-6-1999 under Sec.11 of the Foreigners Order, 1948 by Government of Gujarat Notification No.RCF-1160(II) dated 2-12-1960 to keep the above referred persons in a Joint Interrogation Centre for 14 days for interrogation by all the agencies namely, RAW, IB, CBI, CID, State CID Crime, State Customs Authority and other agencies (from pages 3819 to 3824, Vol.VII, Exs.269 to 273).

7.6 Meanwhile, Captain Sachin of 45 Air Defence Regiment, Kutch Camp at Desalpur

(Guntali), Taluka Nakhatrana, received a secret information about a terrorist being found near Desalpur Division. He in turn informed about it to an Officer of Intelligence Branch of his company i.e. Sanjay Sharma, who, in turn, informed it to Mani Kundan and others. As immediate action was necessary to be taken, Intelligence Branch sought the help of Army and, therefore, Sachipuri was directed along with six persons to go in command post along with weapons and, therefore, they went to the above referred place. After reaching the place of location, they were divided into three groups and after identifying him as the person about whom they received the information, they lied down and by crawling reached near him and he was ordered to put his hands up. The person stood up and tried to run away. Since he started to run towards the Battalion where arms and ammunitions were kept, order of firing was given to restrain him from causing damage to weapons. Due to firing, said person fell down

on land. On his personal search, his identity card, cash amount of Rs.16,000/-, one pistol marked with star and one wrist watch were found. As he was alive, he was lifted and taken near the jeep. At that time, the person who was helping in carrying him i.e. Sivadasan had carbon machine gun which was loaded at that time and when hand of injured person touched upon his sticker, firing took place and Army person Reddy received injury on his leg. Thereafter, Reddy and the injured were taken in a jeep. In the meanwhile, as the injured was dead, he was taken to Nakhatrana Police Station and handed over there and Army person Reddy was taken to Military Hospital at Bhuj for treatment. Name of the above referred person whom army personnel fired and later on died was Hussain Suleman Sota and Janvajog Entry No.54 of 1999 was registered on the same day i.e. on 7-6-1999. Arrangements were made by the police for inquest and the post mortem of the dead body of said Hussain.

7.7 Meanwhile, various Central as well as State agencies started investigations into the matter regarding the intruders who have been kept in the Joint Interrogation Centre from whom above referred serious arms, ammunitions and explosive substances were recovered. The agencies started investigation towards persons of Indian origin also. On 14-6-1999, Dy.S.P., Mr.P.L.Mal, Nakhatrana, District Kutch, filed complaint against the aforesaid six accused as well as against others on behalf of the State and it has been registered as Dayapar Police Station I.C.R.No.12 of 1999 naming 16 persons and others as the accused. After making endorsement to that effect, investigation was started. During the course of investigation, they recorded statements of various witnesses and also investigated towards the local people i.e. Indian nationals staying very near to the border whose names were disclosed during investigation with their act and, therefore, some of them were arrested also and statements of various witnesses were recorded. Raid was

carried out at the house of one Abdulla Adam Shaikh after drawing panchnama to that effect. Even statements of STD booth holder and the person with whose help others have travelled were recorded. Arrangements were also made for sending the muddamal to FSL for analysis and the muddamal weapons for opinion of Ballistic Expert. Simultaneously, moulded foot prints along with shoes etc. were also sent along with forwarding letter to FSL. On receipt of FSL opinion, same was kept in investigation file.

7.8 Meanwhile, Customs Authorities also started investigation on their own and recorded statements of various witnesses including the accused under Sec.108 of the Customs Act and they have been kept as part of charge sheet. Highly explosive muddamal RDX was disposed of as per order passed by the Court and ultimately, charge-sheet and supplementary charge sheet were filed into the Court.

7.9 As per the direction given by the High Court, common evidence was recorded in Sessions Case No.1 of 2002 and for that, all the connected sessions cases were transferred into the Jail Court. The accused appeared there and charge was also framed against the accused. They pleaded not guilty and prayed for trial.

7.10 To prove the guilt of the accused, prosecution examined in all following 41 witnesses:

i.P.W.1, Shankardan Chendan Gadhvi, Ex.104, the panch witness of panchnama of taking moulding sample of foot prints and also moulding of the plaster of parish on foot prints. He supported the case of the prosecution.

ii.P.W.2, Hamirji Pragji, Ex.106, the panch witness of panchnama of spotting foot prints near Sayra Village. He supported the case of

the prosecution.

iii.P.W.3, Jayesh Rameshchandra Khatri, Ex.111, the panch witness of sealing the whole muddamal at Bhuj. He supported the case of the prosecution.

iv.P.W.4, Premjibhai Naranbhai, Ex.115, the panch witness of discovery of Rs.8400/- from the house of Abdulla Adam. He supported the case of the prosecution.

v.P.W.5, Rajesh Tulsidas Thakker, Ex.121, the panch witness of inquest panchnama on the dead body of Hussain Sota. He supported the case of the prosecution.

vi.P.W.6, Vishal Vijaybhai Dave, Ex.123, the panch witness of recovery of scooter belonging to Narangar. He supported the case of the prosecution.

vii.P.W.7, Musabhai Hussain Kumbhar, Ex.125, the panch witness of panchnama of seizure of clothes of deceased Hussain. He supported the case of the prosecution.

viii.P.W.8, Musha Abhala, Ex.128, the panch witness of panchnama of seizure of pistol

etc. from the deceased. He has been declared as hostile.

ix.P.W.9, Jusabh Haji Hasam, Ex.130, the second panch witness of panchnama of place of encounter of the deceased. He has also been declared as hostile.

x.P.W.10, Arvind Shankarlal Thakkar, Ex.131, the panch witness of panchnama of place of encounter of the deceased. He has been declared as hostile.

xi.P.W.11, Daud Jusabhabhai Sodha, Ex.135, the second panch witness.

xii.P.W.12, Purshottam Lalji, Ex.136, the panch witness of nabbing 5 Pakistani nationals with arms. He supported the case of the prosecution.

xiii.P.W.13, Girishbhai J.Gaur, Ex.140, the panch witness of panchnama of production of articles discovered from the deceased. He supported the case of the prosecution.

xiv.P.W.14, Dayaram Nathubhai Patel, Ex.142, the panch witness of panchnama of muddamal discovered from Siyot hill. He supported the

case of the prosecution.

xv.P.W.15, Dr.Ramesh Ravjibhai Buchiya, Ex.150, the doctor who conducted post mortem on the body of deceased Hussain. He supported the case of the prosecution.

xvi.P.W.16, Navalsinh Batuksinh Jadeja, Ex.158, the panch witness of panchnama of disposal of RDX. He supported the case of the prosecution.

xvii.P.W.17, Vikramsinh Chandrasinh Chudasama, Ex.160, the panch witness of sending muddamal to FSL. He supported the case of the prosecution.

xviii.P.W.18, Samsersinh Divansinh, Ex.165, the witness from BSF. He was member of raiding party of Rajaram Company and identified the report of Khura Checking Party. He supported the case of the prosecution.

xix.P.W.19, Manikanthan Krishnan Nair, Ex.172, the witness from the Army and a member of party in apprehending Hussain Sota and wherein Hussain Sota was shot dead. He

supported the case of the prosecution.

xx.P.W.20, Pravinsinh L.Mal, Dy.S.P., Ex.173, the complainant in this case, who received secret information produced at Ex.410. He has taken active part all throughout from beginning till end and also remained as one of the members of raiding party. He supported the case of the prosecution.

xxi.P.W.21, Ashokkumar Popatlal Jani, Ex.188, Scientific Officer of the Junagadh Laboratory who after examination of foot prints on the spot and moulding of foot prints as well as shoes of accused person gave the report. He also supported the case of the prosecution.

xxii.P.W.22, T.R.Thomas, Ex.193, Deputy Chief Controller of Explosives, who, after examining the explosive substances received along with the LCB, Bhuj, gave report. He supported the case of the prosecution.

xxiii.P.W.23, Ramkishan J.Jasvani, Ex.198.

xxiv.P.W.24, Babubhai Samjibhai Patel, Ex.203.

xxv.P.W.25, Hemendra Jansari, Ex.204, the witness from whose STD, PCO booth, accused

Jakariya used to make telephone.

xxvi.P.W.26, Sambhuji Dadusinh Rathod, the witness familiar with Sharma, I.B. He was declared as hostile.

xxvii.P.W.27, Narangar Mithugar Gosai, Ex.214, the panch witness of panchnama of seizure of clothes of deceased Hussain. He supported the case of the prosecution.

xxviii.P.W.28, Hamid Harun Khalifa, Ex.215. This witness produced the register of the STD, PCO, from where, accused used to make telephone calls.

xxix.P.W.29, Vanrajsinh Devjisinh Chudasama, Police Sub-Inspector of Dayapar Police Station, Exh.217. This witness received report from BSF Khura Checking Party and made entry to that effect in the Station Diary being Janavajog Entry No.22/1999. He was also remained as member of raiding party. He supported the case of the prosecution.

xxx.P.W.30, Mansukhlal Lalji Darad, Superintendent of Customs, Ex.223. This witness recorded statements of Osman and

Jaman Haji u/s. 108 of the Customs Act. He supported the case of the prosecution.

xxxi.P.W.31, Kishorbhai Lakhabhai Chudasama, Superintendent of Customs, Ex.228. This witness recorded the statements of Navaj Ali and Farid Munavar Bhati (absconded) u/s. 108 of the Customs Act. He supported the case of the prosecution.

xxxii.P.W.32, Prafulkumar Harilal Trivedi, Superintendent of Customs, Ex.234. This witness recorded the statements of Sultanshah (absconded) and Sacchu Ibrahim u/s. 108 of the Customs Act. He supported the case of the prosecution.

xxxiii.P.W.33, Raghunandan Chandrabali Pathal, Superintendent of Customs, Ex.237. This witness recorded the statement of Ismail Rava Abada u/s. 108 of the Customs Act. He supported the case of the prosecution.

xxxiv.P.W.34, Dilip Chandravada Raval, Superintendent of Customs, Ex.242. This witness recorded the statements of Abdul Latif @ Fakira and Abdul Vahab u/s. 108 of

the Customs Act. He supported the case of the prosecution.

xxxv.P.W.35,P.N.Jethvani, Supdt. of Customs, Ex.246. He recorded the statements of Khengarji on 04.10.1999, Jakariya on 16.06.1999 and 04.10.1999 and Khengarji on 16.09.1999 u/s.108 of the Customs Act. He supported the case of the prosecution.

xxxvi.P.W.36, Manhar Manilal Thakar, Superintendent of Customs, Ex.251. He recorded the statements of Abdulla Amad Shekh and Mahad Bhakar Rayma u/s. 108 of the Customs Act. He supported the case of the prosecution.

xxxvii.P.W.37, Purshottam Pragji Nanda, Supdt. of Customs, Ex.257. He recorded the statements of Abdul Hamid on 15.09.2000 and Abdul Salim on 15.09.2000 u/s. 108 of the Customs Act.

xxxviii.P.W.38, Vijaykumar Arjunsinh Rathod, Police Sub-Inspector of Nakhtrana Police Station, Exh.263.

xxxix.P.W.39, Dilipkumar R. Agrawat, Police

Sub-Inspector, L.C.B. 2nd I.O., Exh.264.

xl.P.W.40, Anupkumar Yadunathsinh, D.S.P., Kutch, Ex.268. This witness passed order of restriction in respect of all accused persons. This witness wrote letter 17.08.1999 to General Manager, Currency Note Press. This witness granted sent letter dated 30.08.1999 for sanction to the Home Department and letter dated 24.08.1999 for granting sanction under Arms Act and Explosives Act.

xli.P.W.41, Dilipbhai Shantilal Mehta, Police Inspector, L.C.B., First I.O., Ex.290. This witness wrote letters to FSL for examination of the muddamal and also to P.I., L.C.B. Bhuj-Kutch. He received order of Special DIG, Rajkot, Division for the disposal of muddamal RDX. This witness supported the case of the prosecution.

The prosecution also produced the following documentary evidence :-

1.Panchnama of taking moulding sample of foot prints and plaster of parish on foot prints,

Ex.30.

2.Panchnama of foot print near Sarya village,Ex.32.

3.Panchnama of discovery of Rs.8400/- from the house of the Abdulla Adam, Ex.34.

4.Panchnama of sealing whole muddamal at J.I.C., Bhuj,Ex.38.

5.Inquest Panchnama of dead body of Hussain Sota,Ex.40.

6.Panchnama of Recovery of he scooter belonging to Narangar,Ex.42.

7.Panchnama of the seizer of clothes of the deceased Hussain,Ex.44.

8.Panchnama of Seizer of the Pistol etc. from the deceased,Ex.46.

9.Panchnama of place of incident (encounter of the deceased),Ex.49.

10.Panchnama of nabbing Five Pakistanis with arms,Ex.53.

11.Panchnama of producing the article which were discovered from the possession of the deceased,Ex.56.

12.Panchnama of muddamal discovered from the

Siyot,Ex.59.

13.Panchnama of muddamal discovered from the Siyot,Ex.60.

14.Postmortem Note, Ex.63.

15.Panchnama of the disposal of RDX,Ex.66.

16.Panchnama of sending muddamal to FSL Ex.68.

17.Report, mark 70/2,Ex.71.

18.Report, mark 70/3,Ex.72.

19.Report of secret information,Ex.74/1.

20.Letter, mark 76/1, Ex.77.

21.Rojkam FSL, mark 78/1,Ex.80.

22.FSL Examination, mark 78/7,Ex.81.

23.Examination report, mark 78/2,Ex.82.

24.Examination report, mark 78/3,Ex.83.

25.Forwarding letter, Ex.85.

26.Examination report, Ex.86.

27.Receipt of muddamal received,Ex.87.

28.Letter dated 14/07/1999,Ex.88.

29.STD register, mark 90/1,Ex.93.

30.STD – PCO register, mark 95/1,Ex.98.

31.Adhar, mark 95/3,Ex.100.

32.Station Diary entry, mark 95/2,Ex.101.

33.Statement of Osman Ali Mamad,mark 102/3,

Ex.104.

34.Statement of Jamn Haji Mamad, mark 102/4, Ex.105.

35.Statement of Navaz Ali Jat, mark 106/1, Ex.108.

36.Statement of Farid Munawar, mark 106/2, Ex.110.

37.Statement of Sultansha alias Kayamsha, mark 102/1, Ex.113.

38.Statement of Sachu Ibrahim, mark 102/2, Ex.114.

39.Statement of Ismail Rava Abda, mark 111/1, Ex.116.

40.Statement of Abdul Latif alias Fakira, mark 118/1, Ex.121.

41.Statement of Abdul Vahab, mark 118/2, Ex.122.

42.Statement of Tamachi Khengar, mark 118/3, Ex.124.

43.Statement of Tamachi Khengar, mark 118/4, Ex.125.

44.Statement of Jhakaria Haji Nurmamad, mark 118/5, Ex.126.

45.Statement of Jhakaria Haji Nurmamad, mark 118/6, Ex.127.

46.Statement of Abdulla Adam, mark 118/7, Ex.129.

47.Statement of Mamad Bhakhar, mark 118/8, Ex.130.

48.Statement of Abdul Salim, mark 131/7, Ex.133.

49.Statement of Abdul Hanif, mark 131/8, Ex.134.

50.Order of Jaman Haji, mark 131/1,Ex.139.

51.Order of Sultansha mark 131/2,Ex.140

52.Order of Farid Munawar, mark 131/3,Ex.141

53.Order of Sachu Ibrahim, mark 131/4, Ex.142

54.Order of Navaz Ali, mark 131/5,Ex.143

55.Order of Osman Alimamad, mark 131/6,Ex.144

56.Mark 138/1 in reference to 17/08/1999, Ex.145

57.Mark 138/2 in reference to 09/08/1999, Ex.146

58.Mark 138/3 in reference to 17/09/1999, Ex.147

59.Mark 138/4 in reference to 09/08/1999,

Ex.148

60.Mark 138/5 in reference to 17/08/1999, Ex.149

61.Mark 138/6 in reference to 27/05/2000, Ex.150

62.Mark 138/7 in reference to 27/06/2000, Ex.151

63.Mark 138/8 in reference to 30/08/1999, Ex.152

64.Mark 138/9 in reference to 21/09/1999, Ex.153

65.Mark 138/10 in reference to 24/08/1999, Ex.154

66.Mark 138/11 in reference to 25/08/1999, Ex.155

67.Mark 138/12 in reference to 09/09/1999, Ex.156

68.Mark 138/13 in reference to 10/09/1999, Ex.157

69.Mark 160/1 in reference to 05/07/1999, Ex.161

70.Receipt of FSL , mark of 160/2,Ex.162

71.Mark 160/3 in reference to 05/07/1999

letter, Ex.163

72.Mark 160/4 in reference to 05/07/1999, Ex.164

73.Mark 160/5 in reference to 22/08/1999, Ex.165

74.Mark 160/6 in reference to 29/06/1999, Ex.166

75.Receipt of FSL of Mark 160/7,Ex.167

76.Mark 160/8 in reference to 30/06/1999, Ex.168

77.Receipt of FSL of Mark 160/9, Ex.169

78.Report dated 09/09/1999 of Mark 160/10, Ex.170

79.Report dated 09/09/1999 of Mark 160/11, Ex.171

80.Report dated 19/11/1999 of Mark 160/12, Ex.172

81.Report dated 19/11/1999 of Mark 160/13, Ex.173

82.Report dated 06/09/1999 of Mark 160/14, Ex.174

83.Report dated 06/09/1999 of Mark 160/15, Ex.175

84.Report dated 26/01/1999 of Mark 160/16, Ex.176

85.Report dated 09/09/1999 of Mark 160/17, Ex.177

86.Report dated 09/09/1999 of Mark 160/18, Ex.178

87.Letter dated 09/09/1999 of Mark 160/19, Ex.179

88.Report dated 13/07/2000 of Mark 160/20, Ex.180

89.Report dated 15/07/2000 of Mark 160/21, Ex.181

90.Report dated 28/09/2000 of Mark 160/22, Ex.182

91.Report dated 26/09/2000 of Mark 160/23, Ex.183

92.Photographs of xerox attested copies , mark 160/24 to 160/33,Ex.184 to 193

93.Report dated 01/11/2000 of Mark 160/34, Ex.194

94.Report dated 25/10/2000 of Mark 160/35, Ex.195

95.Photographs of xerox attested copies , mark

160/36 to 160/41, Ex.196 to 201

96.Photographs of xerox attested copies , mark 160/42 to 160/45, Ex. 202 to 205

97.Report dated 09/11/2000 of Mark 160/46, Ex.208

98.Letter dated 10/11/2000 of Mark 160/47, Ex.207

99.Order dated 10/07/2001 of Mark 160/48, Ex.206

100.Certificate dated 12/07/2001of Mark 160/49, Ex.209

101.Sanction letter dated 08/11/2000 of Mark 158/1, Ex.210

102.Press Report of Currency Notes , mark 160/50, Ex.211.

7.11 Upon completion of recording the evidence of prosecution witnesses and on receiving the closing purshis, the learned Addl. Sessions Judge, Fast Track Court, Bhuj-Kutch, recorded the further statement of the accused under Sec.313 of the Code of Criminal Procedure qua the incriminating evidence.

7.12 On appreciation of oral as well as documentary evidence and after hearing the arguments advanced by the learned advocates appearing for the respective parties, the learned Addl. Sessions Judge, Fast Track Court, Bhuj-Kutch, held the present appellants-accused guilty and awarded capital punishment and sent the matter to the High Court for confirmation under Section 366(1) of the Code. This has given rise to the Confirmation Cases Nos. 3 and 4 of 2004. The appellants-accused have also preferred Criminal Appeals Nos.567 of 2004 and 643 of 2004. The learned Judge vide aforesaid judgment and order acquitted some of the accused.

8. Heard learned counsel, Mr.Hashim Qureshi for the accused and learned Addl. Public Prosecutor, Mr.R.C.Kodekar, for the State at great length.

9.It is required to be made it clear that learned counsel for the respective parties have taken us through entire oral as well as the documentary evidence together with the impugned judgment in detail. We have also gone through the same in detail. They have also placed reliance upon certain judgments which also we have taken into account. Keeping in mind all these into consideration, we are deciding these matters contentionwise. As the court below while delivering the judgment has reproduced oral evidence of all witnesses in detail, we are not reproducing the same here at this stage. We will however deal with the same accordingly for the purpose of deciding each contention taking into consideration the law laid down by the Apex Court.

10.Learned counsel for the accused, Mr.Hashim Qureshi, raised the contention which has been raised by his counterpart at the court below regarding the delay in filing the FIR mainly

by contenting that Police Officers had a knowledge regarding the cognizable offence on 1-6-1999, the day on which Mr.Rajaram of BSF Khura Checking Party sent the written report mark 13/3(Ex.167) with PSI, Mr.Chudasma of Dayapar Police Station and hence, it was the duty of the Police Officers to have forthwith registered the offence and sent copy of the FIR to the concerned Magistrate within 24 hours as required under the Code. He also contended that accused No.1-Jaman Haji Mamad Jat was apprehended from Haraminale at the time when he was sitting in the boat and on his search, Pakistani currency note of Rs.277/-, Pakistani ISI identity card in the name of Sultanshah Kayamshah, one visiting card of Murad Ali, ASI, Pakistan, etc. were found and he was produced along with the above muddamal to Dayapar Police Station. Hence, at the most, on that day, police had a knowledge regarding the cognizable offence having been disclosed. Still, however, no complaint was registered by police though

being a cognizable offence. It was further contended that in the night of 5th-6th September, 1999, five other accused were apprehended from Gandaro/Sura hill along with lethal weapons and after completing all formalities i.e. drawing panchnama etc., they were brought to Police Station. At that time also, police officers had a knowledge that the cognizable offence has been taken place and the intruders are Pakistani nationals who entered into Indian Territory with arms, ammunitions and explosive substances. Thereafter, during the course of interrogation of Sultanshah @ Kayamshah, it was revealed that at the instance of one Sultanshah @ Kayamshah, huge arms, ammunitions and other explosive substances hidden in Gandaro/Sura hill were seized and hence, at the most, FIR ought to have been registered on that day. Taking us through the evidence on record of witnesses in detail, he contended that then also, no FIR has been lodged and no copy whereof has been sent to

the concerned Magistrate within stipulated period. However, in the guise of restriction order, they did not file the complaint for a period upto 14-6-1999 and, therefore, according to him, there is a deliberate delay on the part of Police Officers. According to him, the delay period has been used by the Police Authorities for the purpose of concocting and falsely involving innocent persons into the crime though nothing was seized at their instance and, therefore, prosecution case fails only on the ground of delay in filing FIR.

11. Whereas Learned Addl. Public Prosecutor, Mr.R.C.Kodekar, taking us through the oral as well as documentary evidence shown to us by the learned counsel for the accused, vehemently objected contending that it was the time when Kargil War was going on and attention of the whole nation was diverted in the war and as far as India is concerned, this was a crucial time and at which point of

time, this conspiracy has been unearthed and present accused were apprehended with huge quantities of arms, ammunitions and explosive substances i.e. RDX. He also contended that all the accused apprehended at first instance are Pakistani nationals who entered into Indian territory along with arms, ammunitions and explosive substances and as the Kargil war was on crucial stage, it was absolutely necessary in the interest of nation to have an investigation made in the offence to reach to the roots of the conspiracy and to know about the intention of the accused and also to nab other accused indirectly involved in waging undeclared war against the nation. It is for this purpose that the D.S.P., Kutch District, under the powers vested upon him passed a restriction order on 6-6-1999 under Sec.11 of the Foreigners Order, 1948 by Government of Gujarat Notification No.RCF-1160(II) dated 2-12-1960 to keep the present accused in a Joint Interrogation Centre for a period of 14 days as investigation was to be

conducted by various agencies of Central as well as State Governments namely, RAW, IB, CBI, CID, State CID Crime, State Customs Authority in a secret manner keeping in mind the seriousness of the conspiracy having hatched. In that situation, if FIR would have been filed and investigation would have been started, then other conspirators would have become more alert and vigilant and, therefore, in the interest of nation, it was required to have been investigated in a secret manner and for that purpose, restriction order was passed. During that period, various agencies have also investigated the matter and, thereafter, complaint was filed on 14-6-1999 by Dy.S.P., Mr.P.L.Mal, Nakhatrana, Bhuj-Kutch, and within stipulated time, copy of the same was sent to concerned Magistrate. Therefore, according to him, there is no delay at all and if at all there is a delay, it will not be fatal to the case of the prosecution as it has been properly and satisfactorily

explained by the prosecution.

12.We have also gone through oral as well as documentary evidence shown to us by the learned counsel for the respective parties together with paragraphs 38 to 44 of the judgment wherein court below has dealt with the same in detail after considering the oral as well as documentary evidence together with the case law relied on by the learned counsel for the respective parties. We are fully satisfied with the reasons assigned by the court below on this aspect and hence, same is not being reproduced here at this stage.

13.We have thoroughly examined all the aspects concerning delay in filing FIR. It is required to be noted that BSF, Khura Checking Party, spotted the foot prints of 6 persons near Sayara Village 1200 meters away from the Guneri Tower outpost. Thereafter, it was informed to Dayapar Police Station in writing which has made Janvajog Entry No.12 of 1999.

Not only that, panchnama of foot prints has been drawn and proper care has been taken for protecting the foot prints by putting iron sheet. Thereafter, two teams were formed and they followed the foot prints and they came to know that the intruders have come from Haraminale and went towards Guneri and, therefore, they proceeded further walking upto 27 kms. As it was practically evening time and as Haraminale is still at a distance of 3 km from the said place, they saw on telescope a man sitting in a boat in Haraminale. They kept watch on that person through telescope and in the early morning went to that place and apprehended the said person, who is accused No.1-Jaman Haji Mamad Jat. From him, ISI identity card, visiting card, identity cards of other persons were recovered. He was first brought to Guneri and later on handed over to Dayapar Police Station along with muddamal and report on 3-6-1999. It is also required to be noted that Dy.S.P., Mr.P.L.Mal, Nakhatrana, Bhuj-Kutch,

also received a secrete information on 4-6-1999 from his personal informant that Pakistani intruders hid themselves in the culvert situated at the bottom of Gandaro/Sura hill and one Abdulla Adam Shaikh, was providing food to them. The said secret information was reduced in writing by Mr.Mal and went to Dayapar Police Station. Team was arranged and proceeded to Gandaro/Sura hill and apprehended five Pakistan nationals along with various weapons and after drawing panchnama to that effect, they were brought to Dayapar Police Station. During the course of interrogation of one of the accused namely, Sultanshah @ Kayamshah, a person of Pakistan origin, he showed willingness to show the arms, ammunitions and explosive substances hid by them in Gandaro/Sura hill and, therefore, again panchas were called and they proceeded towards the said place as per the instruction given by said Sultanshah @ Kayamshah and at his instance, huge arms, ammunitions and

explosive substances including 54 pistols, 6 revolvers, 24 kg. RDX, wireless set, 15 detonators with wire and detonators without wire, cartridges numbering 572, etc. were seized and detailed panchnamas to that effect was prepared.

14.Realising the seriousness of offence and also the conspiracy being hatched at the time when the Kargil War was going in full swing, Mr.A.K.Singh, D.S.P., Kutch, passed restriction order under Sec.11 of the Foreigners Order, 1948 by Government of Gujarat Notification No.RCF-1160(II) dated 2-12-1960 vested in him whereby accused were ordered to keep in Joint Interrogation Centre for a period of 14 days(pages 3819 to 3824, Vol.VII, Exs.269 to 273). Looking to the seriousness of offence, for reaching the roots of the offence and for the purpose of knowing who are the other persons involved these activities and what they are their intentions and plans, Central as well as

State investigating agencies involved themselves in a secret manner. Therefore, had FIR been filed and copy been sent to concerned Magistrate within 24 hours, everything would have been known to the conspirators and other accused who were indirectly involving themselves and they would have become more alert and vigilant and, therefore, if FIR has not been filed and has been kept as a secret till the investigation by other agencies is over, it would not fatal to the prosecution case especially looking to the facts on record established by way of documentary evidence that as soon as they complete their secret investigation by various agencies, complaint has been filed to that effect and concerned Magistrate was informed accordingly within stipulated period. In view of the above, it cannot be said that FIR has not been filed within stipulated period or deliberately it has been filed after a considerable period for the purpose of concocting or falsely

involving the accused in the crime in question.

15. Law on this point is very clear that if there is a delay in FIR and the delay has been satisfactory explained by the prosecution, then it will never become fatal to the case of the prosecution. Here in this case, court below has rightly dealt with that there is no deliberate delay on the part of the prosecution and whatever delay occasioned has been absolutely necessary in the given special circumstances and it was in the interest of nation. In these circumstances, we do not find any substance in the contention raised by the learned counsel for the accused that prosecution case fails on the ground of non-filing of FIR within stipulated period.

16. Learned counsel for the accused, Mr.Qureshi, also raised the contention that present appellants-accused and two other

accused are fishermen and were doing fishing work in the high sea and from there, they were arrested and a show has been made that they were arrested from Gandaro/Sura hill along with huge arms, ammunitions and explosive substances. In this regard, he took us through the deposition of Rajaram of BSF and contended that it was admitted by this witness in his cross examination that accused No.1-Jaman Haji Mamad Jat has been apprehended from the boat and in the boat, there were food articles but nothing was found from his possession except the muddamal which has been shown by the prosecution i.e. ISI card, identity card of other accused, visiting card of ASI and one chit. According to him, recovery of huge arms and ammunitions effected by the police in the month of February, 1999 were undisclosed for want of necessary accused and the present appellants-accused and other persons who have been arrested from the high sea have been shown as arrested from Gandaro/Sura hill wherein huge

arms, ammunitions and explosive substances were alleged to have recovered. This has been done by the police officers for getting reward and receiving promotion.

17.Learned APP, Mr.Kodekar, however, contended that there is no high sea near Haraminale but high sea is at a different place at a long distance. Haraminale is such a place where back water comes at the time of tide and once a person enters into high sea and reaches the Indian border through Haraminale, he has to go back within the tidal period otherwise he has to wait till next tidal period comes. Hence, the theory of falsely involving the accused with the crime in question is unbelievable looking to the recovery of huge quantities of arms, ammunitions and explosive substances from the accused. According to him, the distance between Gandaro/Sura hill and Haraminale is more than 40-50 kms. There is evidence on record to indicate that out of 7 persons, 6 got down from the boat and

entered into above land with two bundles and they went upto Gandaro/Sura hill with those bundles and they have been arrested from there and, therefore, it cannot be said that they have been arrested from the high sea.

18.We have also gone through the evidence shown to us by the learned counsel for the respective parties and also the above referred point dealt with by the court below in para 143 of the judgment.

19.For the purpose of deciding this point, point of foot prints is required to be dealt with jointly and, therefore, the question regarding foot prints raised by the learned counsel for the accused is required to be seen.

20.It was contended by Mr.Qureshi that the foot prints in question are not of the accused but have been concocted to implicate the accused falsely. Moreover, shoes alleged

to seized from the accused by drawing panchnamas are new ones having the same colour. According to him, panchnamas of foot prints, moulding of foot prints and canvas shoes have been done in absence of accused and, hence, they are concocted for the purpose of falsely involving the accused into the crime in question. It was further contended that the prosecution is not able to prove that the foot prints taken are of the places from Haraminale to Gandaro/Sura hill and link thereof is missing.

21. Learned APP, Mr.Kodekar, drew our attention towards the evidence and contended that there is an independent evidence in this regard and it cannot be concocted in any circumstances of the matter on the ground that as soon as they found foot prints of six persons, immediately without proceeding further, they submitted a report to Dayapar Police Station to that effect only and entry has been made as Janvajog entry No.12 of 1999. He submitted

that even the foot prints have been protected by way of putting them iron sheet bowls and thereafter, panchnamas were prepared. Even expert has been called from Junagadh and in whose presence, marks of foot prints were taken, modules have been developed and handed over to the investigating agency by way of panchnama. The area from Haraminale to Gandaro/Sura hill is a peculiar type of land where there is no road and a person cannot move unless familiar with the nature of that land. It is a shortest route to enter into Indian territory via Kutch border. In view of the peculiar characteristic of the land, there are no check posts in that area and only pillar posts are there and, therefore, they could safely enter into Indian territory. In these circumstances, if at all they are fishermen and have been arrested from the high sea, it is not a place where their presence can be shown because high sea is at a different place at a long distance. The accused have been apprehended and

arrested from Gandaro/Sura hill which is part and parcel of Indian territory and which is far away from Haraminale. Moreover, looking to the huge quantities of arms, ammunitions and explosive substances recovered from the accused, no prudent man can say that they are concocted to falsely involve the accused especially when no enmity has been established for involving them into the case falsely.

22.We have also gone through the documentary as well as the oral evidence shown to us by the learned counsel for the respective parties and also through relevant portion from paragraph 52 onwards of the judgment wherein court below has dealt with the same in detail. In order to decide the point of foot prints, we have taken into consideration the evidence of P.W.2, Hamirji Pragni, Ex.106, who is a panch witness of spotting foot-prints by BSF people very near Guneri Outpost more particularly 1200 kms. away on

eastern side and also very near Sayra Village. We have also considered the evidence of P.W.1, Shankardan Chendan Gadhvi, Ex.106, who is the panch of panchnama of taking moulding sample of foot-prints of six intruders who came from Pakistan and entered into Indian territory. Thereafter, in presence of above panchas and Scientific Officer, Junagadh, Mr.Ashoklal Popatlal Jani, P.W.21, Ex.188, foot prints were developed from plaster of parish and handed over to PSO, Mr.Dhirubha B.Jadeja for sending the same to FSL. In this respect, we have also taken into account the evidence of PSI, Mr.V.D.Chudasma, the person who remained present and prepared the panchnama.

23.It is required to be noted that as per the prosecution case, there were 7 persons in the boat and when teams of BSF Khura Checking Party tried to follow the foot prints upto Haraminale, they apprehended one person who was sitting in the boat and he was ultimately

brought to Dayapar Police Station with the muddamal seized from him and thereafter, as stated earlier, during the course of interrogation, as Dy.S.P., Mr.Mal, received secret information, raid was carried out and other five persons were apprehended and arrested with arms, ammunitions and explosive substances from Gandaro/Sura hill area. Later on, one person was killed in the firing by the Army personnel very near the depo of arms and ammunitions as he did not respond to the call of Army personnel. In this connection, we have considered the evidence of P.W.5, Mr.Rajesh Tulsidas Thakkar, the panch of inquest panchnama on the dead body of Hussain Sota. Since the place is at a different side from where five other accused and accused No.1 were arrested, it cannot be said that all were arrested from high sea more particularly when their foot prints have been found which is the main base for investigation by BSF and other agencies and which led BSF Khura Checking Party to proceed

further. Even foot prints have been protected and thereafter, person from FSL, Junagadh, was called and in his presence, moulded foot prints have been taken including moulded shoes, etc. and ultimately, FSL expert opined that they are the foot prints of accused who were arrested. The foot prints of person who was killed has also been opined by the expert as one of the foot prints preserved and, therefore, it cannot be said that the accused have been arrested from high sea because foot prints were 30 kms. inside Indian territory from Haraminale.

24.Keeping in mind the geographical situation of the area and also the fact that accused No.1 has been apprehended from Haraminale which is the end portion of Indian territory and also the fact established, which is not disputed much, that it is not a part of sea but place where back water comes at the time of tide, if person wants to enter into Haraminale for entering into Indian border

then one will have to wait till the tide comes and when the help of tide, he can enter into the Indian border and has to return before the tide gets over or else, he has to wait till next tide comes. Therefore, it cannot be said that it is a place where fishing can be done. It is also not their case that they were doing fishing in Haraminale. It is their case that they were doing fishing in the high sea. However, muddamal articles such as ISI identity card, identity cards of other persons and other muddamls recovered from them showed that they were not fishermen. Not a single muddamal is there on record to show that they are fishermen and they have been permitted to enter into the sea for fishing by Pakistani authority. It is also required to be noted that learned counsel for the appellants-accused did not dispute the nationality of the appellants-accused and other two accused but submitted that they are Pakistan nationals. Apart from that, there are

evidence on record supporting the say of the prosecution also that they are Pakistani nationals. Moreover, at the time of recording the further statements of the accused, specific questions were asked by the court below and each of the appellants-accused had mentioned about their place of birth and nationality and stated that they are Pakistani nationals and are fishermen. In these circumstances, the contention raised by the learned counsel for the appellants-accused that the appellants-accused are fishermen and have been arrested from high sea is not tenable more particularly in view of documentary evidence on record apart from the scientific evidence collected and proved by the prosecution coupled with recovery of huge arms, ammunitions and explosive substances along with arrest of the accused. If they are fishermen, they would have remained in the high sea. They were however knowing what they are doing and what are their intentions and with those intentions,

they entered into Indian territory through back door with huge arms, ammunitions and explosive substances and hid them in Gandaro/Sura hill by keeping in touch with the local people to execute their plans and, therefore also, we are unable to accept the contention that they have been arrested from the high sea.

25.Mr.Qureshi also raised the contention regarding search and seizure of muddamal at the instance of Sultanshah @ Kayamshah. He contended that as such no alleged muddamals have been recovered from the accused as narrated in the panchnama Ex.148. According to him, all the accused were arrested from high sea and the muddamals seized by the police in the month of February, 1999 have been shown by preparing false panchnama stating that same have been recovered at the instance of accused No.2-Sultanshah @ Kayamshah and innocent fishermen have been involved falsely into the crime in question

and hence, according to him, it is case of planting. He also contended regarding genuineness and integrity of panchas and the way in which panchnamas were drawn. According to him, detailed panchnama carried after taking muddamals into Joint Interrogation Centre was for falsely involving the accused into the crime.

26. Mr.Kodekar, learned APP, placing reliance on the evidence relied on by the learned counsel, Mr.Qureshi, contended that as per the oral as well as the documentary evidence on record, accused have been apprehended along with deadly weapons from Gandaro/Sura hill and thereafter, at the instance of Sultanshah @ Kayamshah, huge quantities of arms, ammunitions and explosive substances have been recovered. Showing us the evidence of panchas, Police Officers and also the panchnamas, he contended that panchnamas are trustworthy. Moreover, panchas are respected persons and their presence is genuine and

hence can be taken into consideration. As regards drawing detailed panchnama at Joint Interrogation Centre, it was contended that it was the night time and hence, after preparing panchnama on the spot and after effecting seizure, all the accused were brought to Joint Interrogation Centre where detailed panchnama was drawn. The question of falsely involving the accused into the crime is out of question because huge quantities of arms, ammunitions and other explosive substances have been recovered from the accused. In view of the above, question of planting also does not arise. As far as seizure of muddamals by the police in the month of February, 1999 is concerned, separate Janvajog entry has been made at Narayan Sarovar Police Station.

27.So as to decide this point, we have also gone through the evidence of P.W.14, Dayaram Nathubhai Patel, Ex.142. He is the panch witness of panchnama of recovery Ex.148 and

one of the witnesses who remained all throughout with Sultanshah @ Kayamshah and other police personnel from the police Station to the place where the muddamal has been shown by Sultanshah @ Kayamshah. Thus, he is not only the panch witness but also the witness from the stages of drawing and completing primary panchnama till muddamals were brought to Joint Interrogation Centre. Thereafter also, he has shown willingness to work as panchas of detailed panchnama Ex.149. This panch being the important independent witness, his evidence has got more evidential value. We have also gone through the evidence of Dy.S.P., Mr.Mal, who is the complainant of this case and the person who received secret information from his personal informant as well as the person who took active part in the investigation from its initial stage till completion. We have also gone through the evidence of Vanrajsinh Devjisinh Chudasma, P.W.29, Ex.217, who is the Police Sub Inspector, Dayapar Police Station. We have

also gone through the detailed evidence including the cross examination of above witnesses and nothing contrary came out in their cross examination which shake their evidence. Court below has also dealt with the same in detail in its judgment. We are therefore of the opinion that question of planting the muddamal and involving the accused falsely in the crime in question is thoroughly ruled out keeping in mind the facts that huge quantities of arms, ammunitions and other explosive substances were recovered from the accused as narrated in the panchnama. Merely detailed panchnama was prepared after bringing the muddamal along with accused and panchas at Joint Interrogation Centre does not mean that it was for the purpose of planting. We rather say that it is absolutely necessary in the normal circumstances because the place where muddamal was hidden was completely isolated situated in the hill and it was night time and, therefore, panchnama of recovery was

prepared there itself and detailed panchnama after opening the bags was required to be done and, therefore, same were brought to Joint Interrogation Centre and only on that ground, the whole evidence of the prosecution regarding recovery of huge arms, ammunitions and explosive substances cannot be discarded.

28.Next point as raised by the learned counsel for the appellants-accused to be dealt with by this Court is about recovery of RDX. It has been contended that one of the muddammals recovered at the instance of Sultanshah @ Kayamshah was muddamal weighing 24 kg. which, according to the prosecution, is RDX. According to Mr.Qureshi, the prosecution failed to prove that said 24 kg. muddamal is RDX. The prosecution also failed to prove that it has been recovered at the instance of Sultanshah @ Kayamshah from the possession of other accused as per the panchnama Ex.148 from Gandaro/Sura hill. It has been further contended that said muddamal has been

disposed of without following proper procedures.

29. In order to decide this point, the panchnamas of recovery of muddamal arms, ammunitions, explosive substances etc., Exs.148 and 149 are required to be gone into. It is required to be noted that panchnama Ex.148 has been prepared at the place where above referred muddamals have been seized at the instance of Sultanshah @ Kayamshah in which panchas as well as Police Officers have signed. Panchnama Ex.149 appears to have been prepared in presence of panchas Parsottam Vasanji Thakkar and Dayaram Nathubhai Patel which formed part of this record at Volume VII, page 365. This shows that first primary panchnama was drawn at Dayapar Police Station and thereafter, final panchnama was drawn at the Joint Interrogation Centre wherein details have been narrated regarding the arms, ammunitions, explosive substances, etc. recovered (page 3659) and above referred

panch witness, P.W.14, Dayaram Nathubhai Patel, who has been examined at Ex.142, supported the panchnama in toto. Prosecution also got support from the evidence of Police Officer in whose presence panchnama has been prepared i.e. Dy.S.P., Mr.P.L.Mal, Nakhatrana, District Kutch. Thus, it has been proved by way of above evidence that the alleged RDX has been recovered at the place at the instance of Sultanshah @ Kayamshah. It is also established that it is an isolated place where only the person having the knowledge or who have hidden the same will have the information. It is also proved that the said RDX muddamal when sent to FSL was sent back with a direction to send only sample from each of the packets and same has been done by the investigating agency. In this regard, prosecution has relied upon the evidence of Vikramsinh Chandrasinh Chudasma, P.W.17, Ex.160, who is one of the panch witnesses along with other panch Mr.Rajesh Parmar, who showed willingness at the Joint

Interrogation Centre to remain present and work as panchas and in whose presence, RDX was recovered from the packets of muddamal. In all, 48 samples were drawn from each of the packets and were sealed in their presence after putting the panch slip and remaining muddamals were also sealed in the same manner. This witness supported the panchnama in toto and through whom, panchnama Ex.161 has been proved by the prosecution.

30.We have also gone through the evidence of Dilip Shantilal Mehta, P.W.41, Ex.290, who is the Police Inspector, LCB and the First Investigating Officer in this case. He proved the correspondence with FSL authorities which reflects from paras 10 and 11 of his evidence. It has been categorically deposed by him that he has sent the muddamal of 24 kg. RDX to FSL along with other muddamals. He proved copy of forwarding letter Ex.296 and receipt received from FSL Ex.297. Thereafter, further instruction was sent by FSL Ex.298

whereby it was requested that since the muddamal was a highly explosive substance in huge quantities weighing 24 kg., sample of each packet be sent for analysis. He also proved correspondence between FSL and Investigating Officer at Exs.299 to 303. After receiving the final reports from FSL Exs.304, 305 and 306, they were kept in investigation file.

31. We have also gone through the final report sent by FSL in respect of RDX Ex.305 wherein it was categorically opined by the FSL expert that the muddamal analyzed by them is a highly explosive substance generally known as RDX. In view of the above evidence on record, we are of the opinion that other muddamal which has been recovered from the accused are highly explosive substance RDX weighing 24 kg. It is evident from record that the said muddamal is a highly explosive substance and since is very dangerous to keep, special permission was obtained from the Court for

disposing of the same and same has been destroyed in presence of panchas. From the above referred evidence and correspondence, prosecution has proved by way of evidence of explosive expert and ballistic expert that muddamal postols, revolvers, ordinary detonators, electric detonators and other detonators are highly explosive requiring license to keep and no such permission was obtained by the accused for keeping the same and same has been proved by way of Ex.195. It is also proved from the record that these are articles used for making explosive bomb and therefore, prosecution is able to prove that the accused entered into Indian territory with the banned RDX weighing 24 kg. which are used for preparing explosive bomb.

32.In view of the above discussion, we are of the opinion that prosecution is able to prove beyond reasonable doubt by way of documentary as well as oral evidence on record that muddamal explosive substance weighing 24 kg.

recovered from the custody of accused at the instance of Sultanshah @ Kayamshah is RDX and has been scientifically proved as highly explosive RDX. Merely because accused Sultanshah @ Kayamshah was able to abscond as a result of devastating earthquake which took place in Kutch, Gujarat, on 26-1-2001 when jail was collapsed, it cannot be said that the recovery effected has not been proved especially when it has been proved by documentary as well as oral evidence that huge quantities of arms, ammunitions and explosive substances along with ancillary items used for making bomb have been recovered. We therefore negative the contentions raised by the learned counsel for the appellants-accused.

33.As regards the statements recorded by the Customs Authorities of various persons including the present appellants-accused under Sec.108 of Customs Act, same has been objected by the learned counsel for the

appellants-accused in the court below as well as this Court. Said aspect has been dealt with by the court below in detail after considering various judgments relied on by the learned counsel appearing for the respective parties.

34. Facts remain that while elaborately discussing the evidence, no much weight has been given by the court below on the statements recorded under Sec.108 of the Customs Act. Court below has only observed keeping in mind other aspects that those statements can be used as corroborate piece of evidence and for a limited purpose. It is required to be noted that some of the witnesses have not even signed the statements. We are however of the opinion that prosecution is able to prove the case beyond reasonable doubt against the present appellants even in absence of statements under Sec.108 and, therefore, we are not dealing with the same. We are also not giving

much weight on those statements in deciding these matters.

35.We have dealt with the contentions pointwise raised by the learned counsel for the appellants-accused orally before this Court as well as in the written submissions forming part of record. We have also gone through the evidence shown to us by the learned counsel for the respective parties which were necessary for deciding these matters.

36.We have mainly gone through the evidence of P.W.18, Samsersinh Divansinh Mehta, Ex.165, the person who was serving in BSF and posted at the border of Kutch-Bhuj. He was also one of the persons who went upto Haraminale on the basis of foot prints and which led them to apprehend the accused No.1 along with the muddamal and thereafter to take him to Guneri and ultimately hand over to Dayapar Police Station and in respect of which, Janvajog

entry has been registered with Dayapar Police Station. Prior to that, BSF Khura Checking Party spotted the foot prints of six intruders indicating that they came from Pakistan side and entered into Indian territory near Sayara Villge 1200 meters away from the Guneri Tower outpost. Immediately thereafter, Rajaram sent a written report to that effect to Dayapar Police Station and Janvajog entry has been made to that effect and PSI, Chudasma and others reached the above place and panchnama to that effect was drawn. Foot prints were preserved by putting iron bowls upon foot prints and thereafter they called Scientific Officer of Junagadh Laboratory, Mr.Ashokkumar Popatlal Jani and thereafter in his presence and in presence of panchas and Police Officers, foot prints were moduled there itself and given to PSO for handing them over to Dayapar Police Station for further analysis by FSL. During the interrogation of accused No.1, they came to know that there are six other persons already

entered into the Indian territory with huge arms, ammunitions and other explosive substances. Meanwhile, Dy.S.P. Mr.Mal posted at Nakhatrana also received secret information from his informant and, therefore, he reduced it in writing and informed his superior officers and went to Dayapar Police Station and after informing his superior officers arranged a team and as per the information proceeded to the place of information situated at Gandaro/Sura hill wherein they apprehended five persons and panchnama to that effect was prepared there itself in presence of panchas and police personnel. Out of five, three were having loaded weapons and thereafter, all the accused were brought to the Police Station. During the interrogation of accused-Sultanshah @ Kayamshah, he showed willingness to show the arms, ammunitions and other explosive substances and hence, at his instance, 54 pistols, 6 revolvers, 20 kg. RDX contained in 12 packets, one wireless set, 15

detonators having green and yellow colour wire, 15 ordinary detonators, 10 timer pencils, one remote box, codex wire, 473 cartridges of 0.30 bore, 29 cartridges of 0.32 bore, 49 cartridges of 92 MM pistol, 21 blank cartridges and in all 572 cartridges and 54 spare magazines were recovered as reflects from panchnama Ex.148 and detailed panchnama Ex.149. As Kargil War was in full swing, Mr.A.K.Singh, who was DSP of Kutch District at the relevant time, came to the conclusion that there are all possibilities of there being a serious conspiracy involving more other people actively and hence, secret investigations are required to be done by various agencies and, therefore, he passed an order under Sec.11 of the Foreigners Order, 1948 by Government of Gujarat Notification No.RCF-1160(II) dated 2-12-1960 whereby all the six accused were kept at Joint Interrogation Centre. As established from the record, various Central and State agencies such as RAW, IB, CBI, CID, State CID Crime,

State Customs Authority and all other agencies actively involved in reaching at the roots of the conspiracy because the accused who have been arrested with huge quantity of arms, ammunitions and explosive substances are of Pakistani nationals and it was the time when Kargil War was going on. At the end of secret investigation, complaint to that effect was filed by him and further investigation was started. It may be noted at this stage that during the course of further investigation, as the accused Sultanshah @ Kayamshah absconded on 26-1-2001 i.e. the day on which a devastated earthquake has taken place in Gujarat when the Bhuj Jail has been collapsed. Therefore, by way of specific order, his trial has been separated. During the course of further investigation, as the prosecution was able to find that there are local people staying in the border area of Kutch District who are actively involved in the crime in question, they started search and seizure, recorded statements of various

persons and collected the evidence to that effect and some of them have been made accused in this case. Thereafter, at the end of investigation, charge sheet has been submitted and for the purpose of proving the guilt against the accused, the prosecution examined in all 41 witnesses and also relied on documentary evidences numbering 102. Out of which, for the purpose of deciding these matters, learned counsel for the parties have taken us through various important witnesses.

37.It is required to be noted that P.Ws. 1 to 14, 16 and 17 are the panch witnesses out of which, except two witnesses, all have fully supported the case of the prosecution. The prosecution is able to prove the guilt through the evidence of panchas and police police officers also who remained present and prepared panchnamas in presence of panchas. The important witnesses among them are P.W.18, Samsersinh Divansinh, Ex.165, the person from BSF, who apprehended the accused

No.1 from the boat at the time when he was in Haraminale in Indian territory; P.W.20, Pravinsinh L.Mal, Dy.S.P., Ex.173, the complainant in this case; P.W.17, Mr.V.C.Chudasma, PSI of Dayapar Police Station, Ex.160, the person who took active part in the investigation from the stage of taking foot prints till the end of investigation along with the investigating officer; P.W.39, Dilipkumar R. Agrawat, Police Sub-Inspector, L.C.B., Ex.264, the second I.O. of the case; P.W.40, Anupkumar Yadunathsinh, the D.S.P. at the relevant time of Kutch District, Ex.268, under whose guidance and supervision, whole operation has been carried out and who passed the restriction order and P.W.41, Dilip Shantilal Mehta, the Police Inspector, LCB and the First Investigating Officer, Ex.290. We have also gone through the evidence of prosecution witnesses 30 to 37, who recorded statements of various witnesses including appellants-accused under Sec.108 of Customs Act. Over

and above, there are witnesses of experts namely P.W.22, Ashokkumar Popatlal Jani, Ex.188, Scientific Officer of the Junagadh Laboratory and P.W.22, T.R.Thomas, Ex.193, Deputy Chief Controller of Explosives, through whom prosecution has proved FSL and ballistic reports. We have given thoughtful consideration to the evidence of all the aforesaid witnesses.

38. It is required to be noted that defense of the appellants-accused into the court below as well as this Court is practically of a denial in nature. Specific defense was taken that they are fishermen and were doing fishing work in the high sea from where they have been arrested and have been falsely involved into the crime in question and the muddamal seized in February, 1999 have been shown as seized from the appellants-accused. We have also gone through the cross examination to that effect along with their further statement and we are fully satisfied

about the recovery of arms, ammunitions and explosive substances and other materials from the appellants-accused and hence, the theory of planting cannot be sustained. Thus, prosecution is able to prove the case against the accused beyond reasonable doubt by way of evidence of all the above referred various witnesses. It is true that most of the witnesses are Police Officers. However, facts remain that the place where they hid themselves is such where no population exists and the area is also such where except pillar post, no other posts exist and because of the peculiar geographical situation, they have selected the said place. In these circumstances, one cannot expect to have any independent witness to the same at the time of raid etc. Facts remain that raid has been carried out in presence of panchas and they have remained with the Police Officers all throughout, i.e. from the beginning of primary panchnama till the end of raid. They have been examined by the prosecution and

they have thoroughly supported the say of the prosecution and when they stood in the cross examination, nothing contrary came out which shake their evidence except normal denial and minor contradiction. As stated above, the prosecution also got support from the evidence of Police Officers. Merely because they are Police Officers, their evidence should not be believed is not the criteria. The criteria is that if their evidence are natural and believable, certainly Court can rely upon the same. We have considered the same in that direction and say that their evidence are natural and trustworthy.

39. It is also required to be noted that it is a case of conspiracy and conspiracy cannot be hatched in public but is hatched within four corners. It is clear that the appellants-accused are Pakistani nationals and conspiracy has been hatched in Pakistan and it has been put in motion in India through these people and, therefore, there cannot be

any direct evidence to that effect. It is not the case of the accused that they are not Pakistani nationals and no such argument has been advanced. However, it has been replied to a specific question put to the accused that they are Pakistani nationals. Question was put to Police Officers by the learned counsel for the accused as to why the Police Officers did not go to Karachi and investigate the matter there also. It is a question which does not require any discussion. However, facts remain that the accused have been apprehended and arrested from an isolated place in Indian territory more particularly 40-50 km. away from Pakistan border where they hid themselves with huge quantities of arms, ammunitions and explosive substances and same have been seized at the instances of one of the accused. Mere suggestion that it is a public place does not mean that it is a place accessible to all as it has been hidden in Gandaro/Sura hill in an isolated area and,

therefore, except the accused persons, others may not be knowing about the same. This aspect has been clearly established by the prosecution. Apart from that, some more link has also been established but it is regarding other accused who have involved themselves into the crime in question after these accused entered into India. They are not before us and, therefore, it is not advisable to discuss on the same at this stage. However, it is required to be noted that the appellants-accused have stated in their statements recorded under Sec.108 of the Customs Act that they have been engaged as carriers for the purpose of transporting the muddamals into Indian territory and, therefore, possibility of they being carriers cannot be ruled out. We are however fully satisfied that there are evidence on record connecting the appellants-accused with the crime in question which have been satisfactorily proved by the prosecution. Law on this point is very clear and we have

discussed all the contentions raised by the learned counsel for the appellants-accused pointwise after giving careful consideration and we are of the opinion that prosecution is able to prove the case against the accused beyond reasonable doubt.

40. As far as awarding capital punishment to the appellants-accused is concerned, the Court below after holding the accused guilty, has heard the learned counsel appearing for the respective parties on the point of sentence and thereafter dealt with the same in para 149 of the judgment. Para 149 reads as under:

> "**149.** Considering the argument of both the parties, in this case, it is proved beyond doubt that when the Kargil war between India and Pakistan was going on and taking the advantage of this critical circumstances, these accused infiltrated with twenty four (24) kilo RDX and other explosive implements for its use and with other serious devices in the Indian border. In this case if the substances, which were seized had used, it

would have created horrible situation in this country and thousand of people would have lost their lives. It can be said that when the accused are involved in such activities and the offences against them are proved, this case becomes a rarest of rare case in view of the aforesaid decision by the Honourable Delhi High Court. Therefore it is improper to impose less than death sentence upon these accused. Thus in view of the entire aforesaid circumstances I do not agree with the argument of the learned advocate Shri K.T.Chaudhary for the accused that they should be acquitted by granting set off for the period they have remained in Jail. Considering the aforesaid argument of the learned Special PP and as this case against the four accused is rarest of rare case, the following order of sentence is passed upon them."

8. It was held by the court below on the basis of paragraph 149 of its judgment that it is a rarest of rare case and thereafter passed the final order awarding capital punishment.

41. Coming to the question of the case falling under the rarest of rare, except the afore referred paragraph No.149, court below has not dealt with anything further into the

matter and awarded death sentence.

42.This aspect has also been gone into detail by us. On an evaluation of the entire evidence on record and also taking into consideration the various contentions raised by the learned counsel for the respective parties, we are of the opinion that for the purpose of awarding death sentence, court below has not assigned any satisfactory reason so as to fall the case under rarest of rare. It is required to be noted that at the time of search and seizure of weapons, other four accused were not present on the spot. The weapons have been recovered at the instance of absconding accused-Sultanshah @ Kayamshah. This is one of the reasons for enabling us to come to a conclusion that this is not a rarest of rare case requiring imposition of death sentence. We are therefore of the firm opinion that it is not a case of rarest of rare case for imposition of death sentence.

43.It is also required to be noted that court below has awarded sentence of 20 years and fine for the offence punishable under Sections 4(b), 5 and 6 of the Explosive Substances Act, 1908. However, looking to the facts and circumstances, the said sentence is required to be reduced to 7 years. In view of the above, judgment delivered by the court below qua the appellants-accused is required to be partly set aside and capital punishment is required to be converted into life imprisonment. Therefore the following order is passed:

Both the appeals are partly allowed. Conviction of the appellants-accused (original accused Nos.1 to 4 in Sessions Case No.1 of 2002) under Sec.121 of IPC awarding death sentence vide judgment and order dated 25-3-2004 in Sessions Case No.85 of 1999 by the learned Addl. Sessions Judge, Fast Track Court, Bhuj-Kutch, is set aside and they are sentenced to suffer rigorous imprisonment for

life. Sentence of 20 years imposed for the offence under Sections 4(b), 5 and 6 of the Explosive Substances Act, 1908 is reduced to 7 years RI. Rest of the order of sentence passed by the court below including fines etc. would remain unaltered. References made by the learned Sessions Judge under Sec.366(1) of the Code for confirmation of death sentence are decided accordingly.

Office to place a copy of this judgment in each matter.

(R.P.DHOLAKIA,J.)

(M.D.SHAH,J.)

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